No. 78-740

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR ET AL.,
APPELLANTS

v.

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*, 1a-15a) is not yet reported.

JURISDICTION

This case was decided by a three-judge district court convened under 28 U.S.C. (1970 ed.) 2282. Judgment was entered on June 7, 1978 (App. B, *infra*, 16a-17a). A notice of appeal to this Court

was filed on July 5, 1978 (App. C, *infra*, 18a-19a). On September 12, 1978, Mr. Justice White extended the time for docketing the appeal to and including November 2, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1253. As discussed below, the propriety of convening the three-judge court and hence the jurisdiction of this Court are questioned.

QUESTION PRESENTED

Whether the Secretary of the Interior has authority under the Eagle Protection Act, 16 U.S.C. 668 *et seq.*, and the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, to forbid commercial transactions in birds and parts of birds that were lawfully killed prior to the date their species came under legal protection, as a means of preventing living birds from being killed for commercial purposes inasmuch as there is no effective way of distinguishing old bird feathers from new ones.

STATUTES AND REGULATIONS INVOLVED

Sections 1 and 2 of the Eagle Protection Act, as amended, 16 U.S.C. 668 and 668a; Sections 2, 3, and 12 of the Migratory Bird Treaty Act, 16 U.S.C. 703, 704, and 711; and pertinent regulations of the Secretary of the Interior, 50 C.F.R. 22.2(a) and 50 C.F.R. 21.2(a), are set forth in Appendix D, *infra*, 20a-25a.

STATEMENT

1. The Eagle Protection Act, 16 U.S.C. 668 *et seq.*, was enacted in 1940 (54 Stat. 250). At that

time the Act protected only the bald eagle, but it was amended in 1962 to protect the golden eagle as well (76 Stat. 1246). Section 1 of the Act, 16 U.S.C. 668, makes it unlawful to possess, take, buy, sell, or transport any bald eagles or golden eagles, or their parts, except as permitted by the Act. It provides, however, that if such eagles were lawfully taken before the Act was enacted or amended to protect them, nothing in the Act prohibits the "possession or transportation" of those particular eagles or their parts.

The Secretary of the Interior has issued regulations, 50 C.F.R. 22.2(a), interpreting this proviso of the Eagle Protection Act. The regulations provide that eagles or parts of eagles lawfully acquired before the date they came under the Act's protection "may be possessed or transported" without a permit issued under the Act, "but may not be imported, exported, purchased, sold, traded, [or] bartered * * *." In interpreting the Act to prohibit the buying and selling of birds and parts of birds lawfully acquired before the date of the Act's protection, the Secretary sought to assure that living birds protected by the Act are not killed for commercial purposes. Because it is virtually impossible to distinguish the feathers of recently killed eagles from the feathers of eagles killed a long time ago, an incentive to kill eagles for the value of their feathers would persist as long as artifacts containing new feathers could be sold in the guise of pre-Act artifacts.

The Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, was originally enacted in 1918 and was amended in 1936 (49 Stat. 1556) and 1974 (88 Stat. 190). Section 2 of the Act, 16 U.S.C. 703, makes it unlawful to take, possess, buy, sell, or transport any migratory bird protected by one of the treaties implemented by the Act, or the parts or products of such a bird, except as permitted by regulations issued under the Act.[1] Neither the original Act nor its amendments say anything, by way of either exemption or inclusion, about birds or bird parts that were lawfully taken or acquired before the effective date of the Act's protection.

The Secretary of the Interior is authorized by Section 3 of the Migratory Bird Treaty Act, 16 U.S.C. 704, "in order to carry out the purposes" of the treaties, to adopt regulations specifying "when, to what extent, if at all, and by what means, it is compatible with the terms of the [treaties]" to allow the "killing, possession, sale, purchase, shipment, [or] transportation" of any bird or part of a bird covered by the Act. Invoking this authority, the Secretary has issued the regulation found at 50 C.F.R. 21.2(a). It provides that birds and parts of birds covered by the Act that were lawfully acquired prior to the date of the Act's protection may be possessed and transported without a permit issued under the Act, but

[1] Section 12 of the Act, 16 U.S.C. 711, however, forecloses the issuance of regulations prohibiting the sale of migratory birds "bred on farms and preserves" for "the purpose of increasing the food supply."

may not be bought or sold. Again, the purpose of the prohibition on trade is to prevent the killing of living birds for commercial purposes, in view of the practical impossibility of distinguishing new feathers from old feathers.

2. Appellees filed this action in the United States District Court for the District of Colorado against the Secretary and certain of his subordinates. Appellees alleged that they are owners, sellers, and appraisers of American Indian artifacts containing the feathers of birds protected by the Eagle Protection Act or the Migratory Bird Treaty Act, "which birds were obtained prior to the effective date" of protection under the applicable Act (Complaint at 2, 3, 4, 5, 6). Appellees alleged that they would be harmed in their businesses and their property if commercial transactions in such artifacts were forbidden. They attacked the two statutes and the regulations issued under them on a variety of grounds, including constitutional ones. Because injunctive relief was sought, and because the district court took the view that the constitutional arguments were not frivolous, a three-judge court was convened pursuant to 28 U.S.C. (1970 ed.) 2282.[2]

Appellees contended that the Eagle Protection Act and the Migratory Bird Treaty Act should not be interpreted as applying to feathers from birds lawfully killed before the species came under legal protection.

[2] This statute was repealed by the Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119. Section 7 of the 1976 Act (90 Stat. 1120) provides that it does not apply to actions commenced prior to the date of enactment.

They claimed that the Secretary, by interpreting the Acts to prohibit commercial activity in such preexisting artifacts, had exceeded his authority. They further claimed that if the Secretary's regulations were authorized by the Acts, then the prohibition of commercial activity in previously acquired bird parts constituted a taking of property without due process in violation of the Fifth Amendment, and an arbitrary and irrational restriction beyond the constitutional powers of Congress.[3] None of the appellees alleged, however, that he or she had acquired any such bird parts, or any artifacts containing such bird parts, prior to the applicable statutory date.

On cross-motions for summary judgment, the district court ruled for appellees. The court decided no constitutional issue, but expressed "grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird products" (App. A, *infra*, 13a). To avoid these constitutional doubts, the court interpreted the Acts as "not applicable to preexisting, legally-obtained bird parts or products therefrom," and accordingly held the Secretary's regulations invalid in so far as they prohibit

[3] In addition, appellees claimed that the statutes were unconstitutionally vague because the birds covered by the Migratory Bird Treaty Act and the golden eagles covered by the Eagle Protection Act were not clearly defined as species. They also contended that certain species had been added to the list of those protected under the Migratory Bird Treaty Act pursuant to an improper delegation of authority in the Convention between the United States and Mexico. The court did not reach either of these issues.

commercial activity in such articles (App. A, *infra*, 13a-14a). The court assumed "that there is no 'scientific method' for detecting the age of feathers," but concluded that "these statutes may be enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination" (App. A, *infra*, 5a).

In its judgment, the court declared the Secretary's regulations invalid and unenforceable "as against the Plaintiffs' property rights in feathers and artifacts owned before the effective date of the subject statute" and enjoined the Secretary from interfering with the exercise of those rights, "including the rights of sale, barter or exchange" (App. B, *infra*, 16a-17a).[4]

[4] Although the court's judgment may be read as applicable only to feathers and artifacts that appellees themselves owned before the effective dates of the applicable statutes, the primary thrust of the court's opinion is that sales of feathers or feathered artifacts may not be prohibited so long as the feathers came from birds lawfully taken by anyone before the critical dates. Thus, the Acts were held "not applicable to preexisting, legally-obtained bird parts or products therefrom" (App. A, *infra*, 14a; see also *ibid.*: "Although the sale of plaintiffs' pre-act feathers may not, therefore, be prohibited * * *"). On the other hand, the court stated that the Acts "apply only to birds and products therefrom which the owner acquired after the statutes were enacted" (App. A, *infra*, 13a); like the terms of the judgment, this statement might be read to limit the holding to birds and bird parts that appellees had already acquired before the critical dates.

IF THIS COURT HAS JURISDICTION, THE QUESTIONS ARE SUBSTANTIAL

We are filing this jurisdictional statement to protect the Secretary's right of appeal to this Court in the event that the Court determines that it has jurisdiction to hear this appeal under 28 U.S.C. 1253. That depends on whether the constitutional issues presented in this case required the convening of a three-judge district court under the former 28 U.S.C. (1970 ed.) 2282. As we explain below, we believe that the constitutional issues are not substantial and therefore did not require the convening of the three-judge court, so that this Court lacks jurisdiction. See *Norton* v. *Mathews*, 427 U.S. 524, 529 (1976); *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973). We accordingly request the Court to make an appropriate alternative disposition of the case (see page 23, *infra*). If the Court determines that it has jurisdiction, however, we submit that the questions presented by the decision below are substantial and merit plenary review. In order to assist the Court in making the jurisdictional determination, and in order to demonstrate the substantiality of the questions presented in case the Court finds that it has jurisdiction, we will discuss the statutory and then the constitutional questions involved in the district court's decision.

1. The language of the Eagle Protection Act is clear. Section 1 of the Act, 16 U.S.C. 668, makes it illegal to "take, possess, sell, purchase, barter, * * * transport, export or import, at any time or in any manner any bald eagle * * * or any golden

eagle, alive or dead, or any part" of such an eagle, except as permitted by the Act. An exception is provided in Section 1(a) for the "possession or transportation" of any such eagles, or their parts, that were lawfully taken prior to the date they came under the Act's protection.[5] No exception is provided for the sale or purchase of eagles or parts of eagles taken before the date of protection. One can only infer that Congress intended to forbid commercial activity in pre-protection eagles and eagle parts, at least in the absence of an authorized regulation of the Secretary permitting such activity.

The Department of the Interior first published regulations expressly forbidding the buying and selling of pre-protection eagle parts in 1963. 50 C.F.R. 11.8(b) (1963), 28 Fed. Reg. 975-976 (1963). Their language was identical to that of 50 C.F.R. 22.2(a), the Eagle Protection Act regulation involved here.[6] Congress must have been aware of those regulations when it amended the Act in 1972 to increase the penalties for violations and expand the Act's coverage. Act of October 23, 1972, Pub. L. No. 92-535, 86 Stat. 1064. The legislative history of this amendment contains no indication that Congress disagreed with the Secretary's interpretation of the pre-protection pro-

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[5] Another exception is provided in Section 2, 16 U.S.C. 668a, for certain takings, possession, and uses of protected eagles for scientific, exhibition, or religious purposes, or to protect livestock or wildlife, when specifically authorized by the Secretary.

[6] The court below was in error when it implied that the current regulations were first promulgated in 1974 (App. A, *infra*, 3a).

viso. In fact, the amendment was designed to strengthen the Act because it was not adequately protecting eagles. See S. Rep. No. 92-1159, 92d Cong., 2d Sess. (1972). Whether or not Congress by the 1972 amendment implicitly approved the Secretary's interpretation (see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)), it in no way disapproved it. And that interpretation is not only consistent with the language of the statute but, as a longstanding interpretation by the agency charged with administration of the Act, is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 274-275.

The Eagle Protection Act as interpreted by the Secretary does not represent a new approach to the protection of animal species. In other statutes Congress has likewise sought to eliminate commerce in protected animals or their parts, regardless of when the particular animals were killed, as a means of preventing the further killing of animals of that species. These statutes have been so interpreted by the courts, and they have been upheld against constitutional challenge. In *Delbay Pharmaceuticals* v. *Department of Commerce*, 409 F. Supp. 637 (D. D.C., 1976), the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, was upheld as forbidding sale of a drug containing a substance from the sperm whale, even though the substance was obtained before the whale was protected.[7] In *United States* v. *Rich-*

[7] In 1976, Congress amended the Endangered Species Act of 1973 to permit the Secretary to make a limited exception from the requirements of the Act for sperm whale oil and

ards, No. 77-1603 (10th Cir. Aug. 23, 1978), the Migratory Bird Treaty Act was upheld as forbidding sales of certain migratory birds raised in captivity from legally possessed parents.[8] In *United States* v. *Species of Wildlife*, 404 F. Supp. 1298 (E.D.N.Y. 1975), the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, was upheld as providing for forfeiture of a stuffed leopard imported from Kenya, where it had been killed prior to federal protection. See also *United States* v. *Kepler*, 531 F.2d 796 (6th Cir. 1976) (Endangered Species Act of 1973 upheld as forbidding interstate commercial transportation of wildlife—leopard and cougar—captured before the Act became effective). But see *United States* v. *Aitson*, No. 74-1588 (10th Cir. July

scrimshaw products possessed in the course of commercial activity prior to December 28, 1973. Act of July 12, 1976, Pub. L. No. 94-359, 90 Stat. 911 (adding new subsections (f) and (g) to 16 U.S.C. 1539). The Amendment did not change the approach of the Act and implicitly affirmed the Secretary's power to forbid commercial sales in legally obtained pre-protection animal parts. Moreover, the addition of the new subsections (f) and (g) did not exonerate violations committed prior to the Amendment's adoption. 16 U.S.C. 1539(f)(7), Pub. L. No. 94-359, 90 Stat. 912.

[8] In the "Endangered Species Act Amendments of 1978," Congress has lifted certain prohibitions of the Endangered Species Act of 1973 against the commercial breeding of raptors (S. 2899, Section 4, 124 Cong. Rec. H12904-H12905 (daily ed. Oct. 14, 1978)). The removal of the restrictions applies to raptors legally held in captivity on the effective date of the amendments and to their progeny. The Endangered Species Act Amendments of 1978 were sent to the President on October 30, 1978.

21, 1975) (dictum, in unpublished opinion, that pre-protection acquisition of feathers or birds would be a defense to prosecution under the Migratory Bird Treaty Act).

The approach to pre-protection artifacts taken in the Eagle Protection Act is a reasonable means of promoting the Act's purpose of preventing the present-day killing of protected eagles. Shutting off the market in articles containing eagle feathers may reasonably be considered essential to that purpose, because it is practically impossible to distinguish between old feathers and new ones. Thus, in the affidavit of Dr. Allan Brush, Professor of Zoology at the University of Connecticut, filed in the court below (Exhibit 1 in support of the Secretary's motion for summary judgment, paras. 5-6), Dr. Brush states:

> I can detect no change in the composition of fresh feather material and museum material removed from the skin of birds known, by museum records, to be over 100 years of age. In other words, I know of no good test for ascertaining whether a given feather is a century old or recently taken. Decomposition in bird feathers is such a gradual process that existing scientific methods can detect no change for purposes of ascribing any particular age to feathers. Nor have scientists been able to detect morphological, color or pattern changes in feathers found in archeological digs known to be from the Seventh and Eighth Century A.D. as part of basket-weaver cultures existing in an area now known as the southwestern United States.

Because new feathers can be passed off for old ones, an incentive to kill eagles for their feathers would

persist as long as any trade in feathers or feathered artifacts was allowed.[9]

The court below accepted the premise "that there is no 'scientific method' for detecting the age of feathers," but still determined that a system of registration should be used instead of a prohibition on sales (App. A, *infra*, 5a). It would be very difficult, however, to provide for the marking and registering of old feathers or feathered artifacts in a way that would be permanent and would not be vulnerable to fraud.[10] In any event, the question of what measures to take with respect to commercial traffic in eagle feathers in order most effectively to protect living eagles is a question for Congress, and for the Secretary within the authority delegated to him by Congress. It is not a question for the district court.

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[9] The court in *Delbay Pharmaceuticals, supra*, recognized that similar considerations justified a congressional decision to prohibit trade in a substance derived from the sperm whale even if the substance was obtained before the whale was protected:

> The difficulties in enforcement that would result if trafficking in "legally imported" endangered species were allowed while contraband endangered species were to be excluded from interstate commerce, could be monumental. * * * [A] total ban is easier to enforce than a partial ban. Additionally, if there continued to be a market for "legally imported" spermaceti, it might encourage the illegal taking of sperm whales, a result contrary to the basic goal of the 1973 Act. * * * * [409 F. Supp. at 644.]

[10] See the affidavit of Loren Parcher, Deputy Chief of Law Enforcement, Fish and Wildlife Service (Exhibit 2 in support of the Secretary's motion for summary judgment).

In reading out of the Eagle Protection Act the prohibition on commercial activity in pre-protection eagle feathers, and invalidating the Secretary's regulation, the district court was enforcing its own view "of the wisdom or unwisdom of a particular course consciously selected by the Congress." *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 39. This it had no authority to do. (*ibid.*)

2. The Migratory Bird Treaty Act is similarly clear, but gives the Secretary greater discretion. Section 2 of the Act, 16 U.S.C. 703, makes it illegal to "possess, * * * sell, * * * purchase, * * * [or] transport" any bird or part of a bird protected by the relevant treaties, including "any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof," except as permitted by regulations issued by the Secretary under the Act.[11] Section 3 of the Act, 16 U.S.C. 704, sets out the Secretary's rule-making authority. It authorizes him "to determine when, to what extent, *if at all*, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession,

[11] The phrase, "any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof," was substituted for "any part, nest, or egg of any such birds" by the 1974 amendments that adapted the Act to the Convention with Japan (88 Stat. 190). The legislative history makes it clear that the change was designed only to make plain what Congress believed was already implicit in the Act. S. Rep. No. 93-851, 93d Cong., 2d Sess. 3 (1974).

sale, purchase, shipment, [etc.]" of any bird or part of a bird covered by the Act (emphasis added). This authority is nowhere restricted to illegally taken birds, though Congress did take care to foreclose the Secretary from construing the Act to apply to sales of migratory game birds bred on farms (App. D, *infra*, 24a). (See note 1, ~~*supra*~~ *infra*.)

The terms of the Act thus *prima facie* forbid, and the Secretary is authorized to adopt regulations that do not exempt, sales of protected birds or parts of birds regardless of when the birds were killed. The Secretary's regulation, 50 C.F.R. 21.2(a), exempts the possession and transportation of birds and parts of birds lawfully acquired before the date of the Act's protection, but still prohibits their purchase or sale. This prohibition is well within the Secretary's authority to adopt rules "to carry out the purposes of the conventions" (16 U.S.C. 704).[12] The Secretary's interpretation of the Migratory Bird Act, like his interpretation of the Eagle Protection Act, is consistent with the statutory language and entitled to great weight, *Udall* v. *Tallman*, *supra*. And the approach he has taken—prohibiting commercial

[12] Those purposes are, among other things, to save migratory birds "from indiscriminate slaughter" (Preamble to the 1916 Convention between Great Britain and the United States, 39 Stat. 1702, reprinted in H.R. Rep. No. 243, 65th Cong., 2d Sess. 23 (1918)), and to prevent the extinction of any species of migratory bird (Preamble to the 1936 Convention between Mexico and the United States, 50 Stat. 1311; Preamble to the 1972 Convention between Japan and the United States, March 4, 1972, 25 U.S.T. 3329-3330).

traffic in protected birds and parts of birds, whenever they may have been killed, in order to assure the protection of living birds—is a reasonable one.

In reaching its decision to invalidate the Secretary's regulation, the district court relied in part (App. A, *infra*, 5a-7a) on three early district court cases indicating that, in view of doubts about the power of Congress to provide otherwise, the Migratory Bird Treaty Act did not apply to birds taken lawfully before their species came under the Act's protection. *United States* v. *Fuld Store Co.*, 262 F. 836 (D. Mont. 1920); *In re Informations Under Migratory Bird Treaty Act*, 281 F. 546 (D. Mont. 1922); *United States* v. *Marks*, 4 F.2d 420 (S.D. Tex. 1925).[13] Whether or not these cases were correctly decided in the 1920's, they are of little significance today in the light of more modern recognition of the extent to which legislation may validly affect property rights. See, *e.g.*, *Penn Central Transportation Co.* v. *New York City*, No. 77-444 (June 26, 1978). More consistent with current law is *United States* v. *Richards*, *supra*, upholding regulations under the Migratory Bird Treaty Act that forbade the sale of protected birds raised in captivity. See also *Delbay Pharmaceuticals* v. *Department of Commerce*, *supra*; *United States* v. *Species of Wildlife*, *supra*; *United States* v. *Kepler*, *supra*; and see the discussion in point 3, *infra*.

Thus, in view of the terms of the Migratory Bird Treaty Act and the broad authority the Act gives the Secretary to determine under what circumstances, "if at all," protected birds and their parts may be traded commercially, the Secretary was authorized to adopt the regulations at issue here. The court below erred in declaring them invalid.

3. The district court was of the view that if the Eagle Protection Act and the Migratory Bird Treaty Act prohibited—or authorized the Secretary to prohibit—the sale of birds or part of birds lawfully taken prior to the enactment of legal protection, they would be unconstitutional as a taking of property without due process or just compensation (App. A, *infra*, 5a-

[13] *Fuld* involved a criminal charge of possession and offer for sale of articles made from legally taken heron feathers. The court dismissed the information, taking the view that the owners of the articles would be deprived of property without just compensation if the Act applied and that forbidding mere possession might be unconstitutional as an *ex post facto* law. The Fifth Amendment argument has no merit today (see point 3, *infra*), and the *ex post facto* argument could apply only where possession was made illegal, which is not the case here. *In re Informations* indicated that the Migratory Bird Treaty Act and its regulations were not clear enough to forbid the sale of a legally taken, pre-protection stuffed and mounted duck. In our view the Act itself is sufficiently clear, and the regulations in the preesnt case remove any possible doubt. The rationale of *Marks* is not clear. The case appears to hold that Congress lacks the power to make illegal the sale of legally taken birds because it lacks a "general police power" over migratory birds, a view that has no merit and is not pressed in the present case. The pleading requirement imposed by these cases—that the government in a criminal prosecution under the Act must allege that the birds were taken subsequent to passage of the Act—is rejected in *United States* v. *Hamel*, 534 F.2d 1354 (9th Cir. 1976); *United States* v. *Blanket*, 391 F. Supp. 15, 19 n.1 (W.D. Okla. 1975); *United States* v. *Aitson*, *supra*.

7a, 10a, 13a). We doubt that this prohibition, which applies only to commercial trade in the property in question and not to its possession, would work a constitutional "taking" even if appellees had alleged that they acquired their feathered artifacts before the species of bird from which the feathers came was placed under legal protection. *Jacob Ruppert* v. *Caffey*, 251 U.S. 264, 302-303 (1920). The prohibition of commercial traffic does not amount to a "physical invasion" of the property by the government, and it serves an important public purpose, the preservation and protection of bird species. See *Penn Central Transportation Co.* v. *New York City*, *supra*, slip op. 18-21. Accord, *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958).

But that issue is not presented in this case, for appellees have not alleged a basic element of constitutional "takings": harm to the value of property acquired with "distinct investment-backed expectations." *Penn Central Transportation Co.* v. *New York City*, *supra*, slip op. 18, 21. See also *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1920). Appellees alleged only that they owned or did business in artifacts containing feathers taken from protected birds, "which birds were obtained prior to the effective date of Federal protection of such birds" (Complaint at 2, 3, 4, 5, 6). They did not allege that they themselves had acquired the artifacts prior to the effective dates of federal protection. Thus, even assuming, *arguendo*, that the Acts or regulations brought about a taking of property in pre-protection artifacts, appellees

did not allege that any of their property was thus taken.

In any event, even if there is a taking, nothing in either of these Acts prevents an action in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, for the payment of just compensation. That remedy therefore would be available to anyone who could show an actual taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974). There is, accordingly, no basis for challenging these Acts as denying just compensation (*ibid*).

There is similarly no significant argument that the statutes and regulations here constitute a taking of property "without due process," as alleged by appellees. The protection of eagles and migratory birds is a proper objective of Congress under the Commerce Clause and the treaty power, and the forbidding of commercial transactions in those birds or parts of them is a reasonable means of promoting that objective. That the forbidden activity is harmless in itself does not vitiate the Acts or regulations. The courts do not wield the Due Process Clause to strike down legislative provisions because they are not made "with mathematical nicety or because in practice [they] result in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). Neither is there any merit to the suggestion of the court below, citing *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960), that the statutes and regulations could not pass constitutional muster unless they were the least restrictive measures

possible (App. B, *infra*, 12a). *Shelton* involved a statute directly touching an individual's First Amendment right of association, rather than legislation affecting property interests in order to accomplish a legitimate congressional purpose. See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 377 (1973); *Weinberger* v. *Salfi*, 422 U.S. 749, 768-774).[14]

4. For the reasons just set forth, it is our position that appellees' constitutional claims are wholly insubstantial. If this is so, the three-judge district court should not have been convened (see *Delbay Pharmaceuticals*, *supra*, 409 F. Supp. at 646), and

[14] Neither is there merit to appellees' claims, not reached by the court below, that one or both of the Acts are unconstitutional for vagueness in describing the protected birds. See page 6, note 3, *supra*. To withstand a vagueness challenge, a statute or regulation need only advise a person of common intelligence of what behavior is prohibited. *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972). That requirement is met here. The identity of the eagles protected under the Eagle Protection Act is clear. Nor can there be significant doubt concerning the birds protected by the Migratory Bird Treaty Act. (See the list of protected birds set out at 50 C.F.R. 10.13.) Appellees do not now claim that there is any doubt concerning the protected status of the birds from which the feathers in their artifacts were taken. (This claim, although made in the complaint, was not advanced in appellees' summary judgment motions.)

Appellees' argument that the list of birds to be protected under the Migratory Bird Treaty Act may not be determined by international executive agreement because such action constitutes an unlawful delegation of congressional power to the executive is also without merit. Treaties may validly provide for subsequent binding agreements between the Executive Branch of the government and other nations. See 14 M. Whiteman, *Digest of International Law* 216-233 (1970).

this Court lacks jurisdiction to entertain this appeal. *Goosby* v. ~~*United States*~~ Osser, 409 U.S. 512, 518 (1973); *Norton* v. *Mathews*, 427 U.S. 524, 529 (1976). Accordingly, the Secretary has filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit. The Secretary also filed a notice of appeal to this Court, and is filing this jurisdictional statement, to protect his right of appeal to this Court in the event that the constitutional claims are deemed substantial. Cf. *Turner* v. *City of Memphis*, 369 U.S. 350, 352 (1962).

The notice of appeal to the Tenth Circuit was filed one day out of time, for reasons that we believe constitute excusable neglect under Rule 4(a) of the Federal Rules of Appellate Procedure.[15] The Secretary therefore moved the district court pursuant to Rule 4(a) for an extension of time in which to file the notice of appeal. On September 12, 1978, the court denied this motion, on the ground that a significant constitutional question had been presented in the case and appeal therefore did not properly lie to the court of appeals. The order of the district court stated in part (App. E, *infra*, 28a-29a): "[T]he request is denied for the reason that we do not think that the case is one subject to appeal to the court of appeals, and we do not wish to give tacit approval

[15] The Assistant United States Attorney who was to file the notice of appeal on Monday, August 7, 1978, the last day on which the notice could be filed without an extension, was injured during the preceding weekend, and spent that Monday in a hospital. As a result the notice of appeal was not filed until Tuesday, August 8.

to an appeal which suggests the lack of a substantial constitutional question."

In a situation such as this, where (if we are correct) a three-judge district court has been improperly convened, and where an appeal has been taken to this Court, the Court has jurisdiction to vacate the judgment of the district court and remand the case for the entry of a fresh judgment from which an appeal may be taken to the court of appeals. *Norton* v. *Mathews*, *supra*, 427 U.S. at 531; *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90, 101 (1974). In view of the insubstantial nature of the constitutional claims raised by appellees, we believe that would be the proper course here.

CONCLUSION

The Court should vacate the judgment of the district court and remand the case to that court for the entry of a fresh judgment from which an appeal may be taken to the United States Court of Appeals for the Tenth Circuit. If the Court takes the view that the three-judge district court was properly convened, probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys

NOVEMBER 1978

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75 W 1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD, PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior; ROBERT HERBST, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, DEFENDANTS

Mr. John P. Akolt, III, Akolt, Dick & Akolt, 1510 Lincoln Center Building, 1660 Lincoln Street, Denver, Colorado 80203, attorney for the plaintiffs.

Mr. Joseph F. Dolan, United States Attorney, and Mr. James W. Winchester, Assistant United States Attorney, C-330 United States Courthouse, Denver, Colorado 80294, attorneys for the defendants.

MEMORANDUM OPINION AND ORDER

Before BARRETT, Circuit Judge, WINNER, Chief District Judge, and MATSCH, District Judge.

MATSCH, District Judge

The plaintiffs are owners of, dealers in, and appraisers of American Indian artifacts which include the feathers of various birds. These artifacts all existed before the enactment of federal laws which protect the species of birds whose feathers were used in creating the artifacts. Two of the plaintiffs have been prosecuted for the sale or offering for sale of such preexisting artifacts.

The defendants are responsible for enforcing the Migratory Bird Treaty Act, 16 U.S.C. § 703, *et seq.*, the Eagle Protection Act, 16 U.S.C. § 668, *et seq.*, and the regulations issued thereunder, which prohibit, *inter alia*, the sale of birds or parts of birds which are protected by these statutes. The enforcement policy followed by the defendants is to prohibit commercial activity involving parts of protected birds regardless of the date the parts were obtained. Plaintiffs contend that the defendants' application of these statutes and regulations to preexisting artifacts restricts their ability to engage in a lawful occupation and destroys a valuable property right, all in violation of the constitutional guaranty of due process. On this basis, they have sought declaratory and injunctive relief.

Jurisdiction is provided by 28 U.S.C. § 1331. A three-judge court was convened under 28 U.S.C. §§ 2282, 2284, because this complaint was filed before August 12, 1976. The case is ready for final disposition on cross motions for summary judgment.

The Migratory Bird Treaty Act was passed in 1918

and amended in 1936 and 1974. This statute makes it unlawful to hunt, capture, kill, possess, sell or transport any migratory bird, part, or product including birds or their parts, of any species protected by conventions between the United States and foreign countries. 16 U.S.C. § 703. Neither the original Act nor the amendments make any express reference to birds or parts of birds lawfully taken and possessed before the effective date of the protective legislation.

The United States Fish and Wildlife Service of the Department of the Interior is responsible for the enforcement and administration of the Migratory Bird Treaty Act. In 1974, the Fish and Wildlife Service issued the following regulation:

> Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act (16 U.S.C. 703-711) may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale, trade, or barter, and all shipments of such birds must be marked as provided by 18 U.S.C. § 44 and § 14.81 of this subchapter: *Provided*, That no exemption from any statute or regulation shall accrue to any offspring of such birds.

50 C.F.R. § 21.2(a). The validity of this regulation prohibiting the sale of bird parts acquired by the owner before the effective date of the Act is in issue in this case.

The Eagle Protection Act was enacted in 1940 and amended in 1959, 1962 and 1972. Originally it pro-

tected the bald eagle with the same prohibitions as those in the Migratory Bird Treaty Act. Unlike that statute however, the Eagle Protection Act expressly permits the possession and transportation of eagles and eagle parts lawfully taken prior to its effective date. 16 U.S.C. § 668. The 1962 Amendment extended protection to the golden eagle. Nothing in the Act itself or the amendments mentions the *sale* of pre-act eagle parts.

In 1974, a regulation prohibiting the sale of eagle parts while continuing to permit their possession and transportation was adopted. 50 C.F.R. § 22.2. That regulation has also been challenged in this case.

Plaintiffs claim that these two statutes could not have been intended to apply to existing native art, and that to extend them by the challenged regulations results in a denial of property rights without due process of law and is not required to achieve the apparent purpose of protecting living birds.

The defendants contend that it is impossible to distinguish feathers by age, that living birds are protected by eliminating any market for dead birds, that the Eagle Protection Act explicitly permitted only the possession and transportation of preexisting bird parts and, inferentially, prohibited their sale, and that the statutes are not retrospective in their application because the plaintiffs must do something subsequent to the enactment date to violate them.

The application of these acts to the plaintiffs' artifacts has a destructive and confiscatory effect on preexisting property rights in these items. The questioned regulations have destroyed the right to sell them. Assuming that there is no "scientific method" for detecting the age of feathers, these statutes may be enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination. The defendants have failed to show any efforts to establish such a registration system.

It has long been recognized that in the absence of a legislative prohibition, the capture of birds creates a property right in them. *Shouse* v. *Moore*, 11 F. Supp. 784 (E.D. Ky. 1935). The feathers of such legally captured birds may be converted into aigrettes or other ornaments, and in such "harmless, useful, and valuable property there is a vested right of possession, use, enjoyment, and sale—a liberty of action, of which owners cannot be arbitrarily deprived without compensation." *United States* v. *Fuld Store Co.*, 262 F. 836, 837 (D. Mont. 1920).

The protection of such property rights in legally taken birds or feathers and the items produced with them is precisely what caused federal courts on three different occasions to deny applicability of the Migratory Bird Treaty Act to birds or parts lawfully taken prior to its enactment. In *United States* v. *Fuld Store Co.*, *supra*, a two count information, charging the defendant with possession of and offering for sale aigrettes of heron feathers which it had legally owned before the Migratory Bird Treaty Act was passed, was dismissed for failure to state a crime. The court found that to rule otherwise would result

in depriving the defendant of pre-existing property rights to which its ownership of the articles entitled it:

> Before the act, herons were lawfully killed and their plumage lawfully possessed and sold. Much of this plumage had been converted into aigrettes, artistic, beautiful, useful, and ornamental —harmless and valuable. They had entered into the domain of commerce, and the stock of private property, and were possessed by many persons. An intent on the part of Congress to virtually outlaw and destroy such property ought not to be assumed, unless very clear and the only reasonable construction of the act; for it is very doubtful if Congress has any such power.
>
> . . . [S]uch construction, denouncing as a crime possession and sale of this theretofore lawful private property, would expose the act to serious question as an ex post facto law within constitutional inhibition. . . . All this can be avoided by construction that the act relates only to birds and parts of birds killed subsequent to the act, a permissible and more reasonable construction and in principle always to be preferred to avoid grave doubts of the validity of the law otherwise. (262 F. at 837-38)

Within five years of *Fuld*, two other federal cases were decided upon the same reasoning. *In re Informations Under Migratory Bird Treaty Act*, 281 F. 546 (D. Mont. 1922); *United States* v. *Marks*, 4 F.2d 420 (S.D. Tex. 1925).

The defendants seek to avoid these decisions by arguing that they were "either wrongly decided or have

been overruled by the expansion of the interstate commerce power of the federal government." While it is true that the national government has extended its regulation of interstate commerce, the protection of private property by the due process clause of the Fifth Amendment to the United States Constitution is still very much intact and it must be assumed that the Congress remains respectful of it.

Two other cases offer persuasive authority for not applying these statutes to preexisting artifacts and should briefly be mentioned. In an unpublished opinion in 1975, the Court of Appeals, Tenth Circuit, said that a defendant in a criminal case charging a violation of the Migratory Bird Treaty Act could assert and attempt to prove, as a defense, that the feathers or birds were acquired before the statute. *United States* v. *Aitson* (No. 74-1588, July 21, 1975).

Considering legislation almost identical to the Migratory Bird Treaty Act, the New York Court of Appeals in *A. E. Nettleton Co.* v. *Diamond*, 315 N.Y. Supp.2d 625, 264 N.E.2d 118 (1970), appeal dismissed, 401 U.S. 969 (1971), held that the New York Mason Act did not apply to skins, hides or products therefrom acquired in this country prior to the effective date of the Act, providing that their receipt could be properly documented by U. S. Customs records or authentic inventory or shipment records.

The defendants have cited *Delbay Pharmaceuticals* v. *Department of Commerce*, 409 F. Supp. 637 (D.

D.C. 1976), interpreting the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, to prohibit the sale of animal parts legally held prior to the enactment date. There the plaintiff manufactured a prescription drug called Lotrimin, containing spermaceti, a waxy substance derived from the sperm whale. Plaintiff challenged the seizure of his inventory of spermaceti, including all Lotrimin containing spermaceti, on the ground that it was legally brought into the United States before the enactment of the 1973 Act. Upholding the seizure, the district judge said that the Act's strong enforcement policy required shutting off any interstate market for spermaceti which could encourage the illegal taking of sperm whales.

The conclusion in *Delbay* was based on a finding "that Congress intended to extend the prohibitions of the 1973 Act to their widest possible reach." 409 F. Supp. at 642. Congress' intent in this regard was no doubt based on a concern for protecting wildlife whose very existence is threatened. As evidence of this desire to restrict the taking of these animals "in the broadest possible terms," see H.R. Rep. No. 412, 93d Cong., 1st Sess. at 15, the Act provides that even an unlisted species may be treated as an endangered species if the resemblance between the two is so close such that "enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species." 16 U.S.C. § 1533(e).

Unlike the Endangered Species Act, the statutes in question here include game birds, which plaintiffs point out are legally killed in great numbers each year, and also include such birds as grackles and blackbirds, which the Department of the Interior itself has killed by the millions to protect livestock and agriculture in the southeastern United States. See Public Law 94-207, 94th Cong., February 4, 1976. Furthermore, there is no indication in the Migratory Bird Treaty Act, the Eagle Protection Act, or the legislative history that Congress intended these statutes to be enforced "in the broadest possible terms." Thus, *Delbay*'s heavy reliance on Congress' reaction to the practical circumstances presented by endangered and threatened species is a basis for distinguishing the holding in that case from the issue presented here.

It is unnecessary for us to distinguish the court's treatment in *Delbay* of the due process claim raised in that case. It is worth noting, however, that in dismissing the plaintiff's Fifth Amendment claims, Judge Gasch stated that the Supreme Court has consistently upheld the power of Congress "to exclude from the channels of interstate commerce those products whose movements between the states the Congress deems harmful to the national welfare." (409 F. Supp. at 644) From our review of the cases, this is an accurate statement with respect to statutory prohibitions which "exclude" property from moving in commerce in the sense of limiting its beneficial *use*, e.g., *Reid* v. *Colorado*, 187 U.S. 137 (1902)

[upholding Colorado's law prohibiting the introduction of diseased livestock into the state without first complying with certain quarantine protection measures], or with respect to laws which prohibit the transportation in interstate commerce of articles which are themselves considered injurious to the public, e.g., *Lottery Case*, 188 U.S. 321 (1902) [affirming Congress' power to prohibit the interstate carriage of lottery tickets], or laws which restrict the interstate shipment of articles which, though harmless and useful in themselves, were produced under conditions which are injurious to the public, e.g., *United States* v. *Darby*, 312 U.S. 100 (1940) [prohibition of the shipment of lumber produced under substandard labor conditions held within constitutional authority of Congress]. We would submit, however, that the Supreme Court has never upheld the power of Congress to deprive a person forever of the right to dispose of his private property through commercial channels where such property was legally acquired—in contravention of no public policy—and where the property is not only harmless in itself, but also has intrinsic value.

The *Delbay* decision was never appealed. Shortly after it, the Department of Commerce returned the seized material to Delbay and Congress passed an Amendment to the Endangered Species Act, the purpose of which was "to allow for the limited disposal of pre-Act, legally-obtained endangered species parts and products." H.R. Rep. No. 94-823, 94th Cong., 2d Sess. 3 (1976), U.S. Code Cong. & Admin. News,

p. 1686. In view of what Congress deemed "a severe economic hardship . . . inflicted upon those individuals who were engaged in legitimate commercial activities and who were holding large inventories prior to the passage of the Act," *Id.* at 1686-87, this amendment provided a three-year exemption allowing pre-act scrimshaw and sperm whale oil (which includes spermaceti) to be sold commercially. Public Law 94-359, July 12, 1976. The legislative history of this amendment shows that the Secretary of the Interior, a defendant in this case, fully supported these exemptions and considered it a matter of "great concern [that] individuals legally possessed, prior to enactment of the 1973 Act, parts or products of endangered species for the purpose of sale or for other activities of a commercial nature." Letter from Nathaniel Reed to Carl B. Albert, Sept. 30, 1975, reprinted in H.R. Rep. No. 94-823, 94th Cong., 2d Sess. 8 (1976), U.S. Code Cong. & Admin. News 1976, p. 1691.

Similar wildlife legislation has also recognized the need for protecting preexisting property rights in the products of protected animals. Regulations issued pursuant to the Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*, exempt from the Act's coverage parts and products of marine mammals taken pre-act:

> *Exempted marine mammals or marine mammal products.*
>
> (a) The provisions of the Act and these regulations shall not apply:

(1) To any marine mammal taken before December 21, 1972, or

(2) To any marine mammal product if the marine mammal portion of such product consists solely of a marine mammal taken before such date.

50 C.F.R. § 18.25. To further these exemptions, 50 C.F.R. § 18.14 provides for a registration process so that legitimately taken marine mammal items can be distinguished from those which are illegal. We believe that such a process is an appropriate procedure for balancing the Congressional intent of preserving wildlife with due regard for the vested property rights of individuals. The Constitution would also seem to require it. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

These precedents favor a construction of these acts which would permit the plaintiffs to sell their pre-existing artifacts. No case has ever held that either the Migratory Bird Treaty Act or the Eagle Protection Act apply to property which includes parts of protected birds lawfully existing prior to the enactment dates. There is no indication of any legislative intention that either statute should be so applied. In none of the amendments to these statutes did Congress choose to include pre-act birds or products within the proscriptive terms, despite the existing judicial constructions that the acts applied only to birds and parts thereof taken after Federal protection. We must assume that Congress was acquainted with these cases when the amendments were passed, and

either concurred with them, or decided that a retrospective application of these laws would not be permissible under the Constitution.

We are also mindful of the canon of statutory construction that when a statute is ambiguous, "construction should go in the direction of constitutional policy." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). There are grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird products. In such a case, "[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974), quoting 384 F. Supp. 895, 944 (Special Court, 1974). In short, as stated by Mr. Chief Justice Hughes, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1931).

After reviewing the materials in this case, we are of the opinion that interpreting the Migratory Bird Treaty Act and the Eagle Protection Act to apply only to birds and products therefrom which the owner acquired after the statutes were enacted, is not only a "fairly possible" construction of the acts, but the only possible one.

Having decided that the prohibitions in these acts against commercial activity involving parts of protected birds are not applicable to preexisting, legally-obtained bird parts or products therefrom, we must declare the interpretive regulations, 50 C.F.R. §§ 21.2 (a) and 22.2(a), void as unauthorized extensions of the Migratory Bird Treaty Act and the Eagle Protection Act and violative of the plaintiffs' Fifth Amendment property rights.

Although the sale of plaintiffs' pre-act feathers may not, therefore, be prohibited, the agency may adopt reasonable means for the purpose of identifying and distinguishing pre-act feathers from those of illegally taken birds. An exemption and registration plan similar to those established under other wildlife conservation statutes, discussed *supra*, is an obvious possibility.

Accordingly, it is

ORDERED, that the Clerk of this Court shall enter judgment for the plaintiffs declaring the subject regulations to be invalid and unenforceable as against the plaintiffs' property rights in feathers and artifacts owned before the effective date of the subject statute and enjoining the defendants from any interference with the exercise of such rights, including the rights of sale, barter or exchange.

DATED: June 7, 1978.

BY THE COURT

/s/ James E. Barrett
JAMES E. BARRETT
United States Circuit Judge

/s/ Fred M. Winner
FRED M. WINNER
United States District Judge

/s/ Richard P. Matsch
RICHARD P. MATSCH
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-W-1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD, PLAINTIFFS

vs.

CECIL D. ANDRUS, Secretary of the Interior; ROBERT HERBST, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, DEFENDANTS

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order signed by the Honorable James E. Barrett, Circuit Judge, United States Court of Appeals for the Tenth Circuit; the Honorable Fred M. Winner, United States District Judge, and the Honorable Richard P. Matsch, United States District Judge, on June 7, 1978, it is

ORDERED AND ADJUDGED that judgment is entered for the Plaintiffs declaring the subject regulations to be invalid and unenforceable as against

the Plaintiffs' property rights in feathers and artifacts owned before the effective date of the subject statute and Defendants are enjoined from any interference with the exercise of such rights, including the rights of sale, barter or exchange.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall recover their costs upon filing a Bill of Costs with the Clerk of the Court within 10 days from date of entry of Judgment.

Dated at Denver, Colorado, this 7th day of June, 1978.

/s/ James R. Manspeaker
JAMES R. MANSPEAKER
Clerk
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-W-1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD, PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior; ROBERT HERBST, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Cecil D. Andrus, Secretary of the Interior; Robert Herbst, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; Lynn Greenwalt, Director of the United States Fish and Wildlife Service, Department of the Interior; and Harvey Willoughby, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, the defendants above-named, hereby appeal to the Supreme

Court of the United States from the final judgment entered in this action on June 7, 1978.

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Dated July 5, 1978.

Respectfully submitted,

JOSEPH F. DOLAN
United States Attorney

/s/ James W. Winchester
JAMES W. WINCHESTER
Assistant U. S. Attorney

C-330 U. S. Court House
Drawer 3615
Denver, Colorado 80294
937-2065

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States was served upon John P. Akolt, III, Akolt, Dick and Akolt, 1510 Lincoln Center Building, Denver, Colorado, 80203, this the 5th day of July, 1978.

/s/ Sandra L. Rogers
U. S. Attorney's Office

APPENDIX D

Section 1 of the Eagle Protection Act, as amended, 16 U.S.C. 668, provides in pertinent part:

(a) Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: *Provided*, that in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $10,000 or imprisoned not more than two years, or both: *Provided further*, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: *Provided further*, That one-half of any such fine, but not to exceed $2,500, shall be paid to the person of persons giving information which leads to conviction: *Provided further*, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall

be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle [October 24, 1962].

(b) Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. In determining the amount of the penalty, the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary. For good cause shown, the Secretary may remit or mitigate any such penalty. Upon any failure to pay the penalty assessed under this section, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action.

In hearing any such action, the court must sustain the Secretary's action if supported by substantial evidence.

Section 2 of the Eagle Protection Act, as amended, 16 U.S.C. 668a, provides:

> Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: *Provided*, That on request of the Governor of any State, the Secretary of the Interior shall authorize the taking of golden eagles for the purpose of seasonally protecting domesticated flocks and herds in such State, in accordance with regulations established under the provisions of this section, in such part or parts of such State and for such periods as the Secretary determines to be necessary to protect such interests: *Provided further*, That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior: *Provided further*, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking, possession, and transportation of golden eagles for the purposes of falconry, except that only golden eagles which would be taken because of depredations on livestock or wildlife may be taken for purposes of falconry.

Section 2 of the Migratory Bird Treaty Act, as amended, 16 U.S.C. 703, provides:

> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972.

Section 3 of the Migratory Bird Treaty Act, as amended, 16 U.S.C. 704, provides:

> Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

Section 12 of the Migratory Bird Treaty Act, as amended, 16 U.S.C. 711, provides:

> Nothing in this subchapter shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of birds so bred under proper regulation for the purpose of increasing the food supply.

50 C.F.R. 22.2(a) provides:

> Bald eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to June 8, 1940, and golden eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to October 24, 1962, may be possessed, or transported without a Federal permit, but may not be imported, exported, purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter; and all shipments containing such birds, parts, nests, or eggs must be marked as provided by 18 U.S.C. 44 and § 14.81 of this Subchapter: *Provided*, That no exemption from any statute or regulations shall accrue to any offspring of such birds.

50 C.F.R. 21.2(a) provides:

> Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act (16 U.S.C. 703-711) may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale, trade, or barter, and all shipments of such birds must be marked as provided by 18 U.S.C. 44 and § 14.81 of this subchapter: *Provided*, That no exemption from any statute or regulation shall accrue to any offspring of such birds.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-W-1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD, PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior; ROBERT HERBST, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that Cecil D. Andrus, Secretary of the Interior; Robert Herbst, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; Lynn Greenwalt, Director of the United States Fish and Wildlife Service, Department of the Interior; and Harvey Willoughby, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, the defendants abovenamed, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on June 7, 1978.

Respectfully submitted,

JOSEPH F. DOLAN
United States Attorney

/s/ James W. Winchester
JAMES W. WINCHESTER
Assistant U. S. Attorney

C-330 U. S. Court House
Drawer 3615
Denver, Colorado 80294
837-2065

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 1978, a copy of the foregoing Notice of Appeal was deposited, postage prepaid, in the U.S. Mail to AKOLT, DICK & AKOLT, John P. Akolt, III, 1510 Lincoln Center Building, Denver, Colorado 80203.

/s/ Elizabeth K. Nelson
U. S. Attorney's Office

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-W-1000

L. DOUGLAS ALLARD, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior, ET AL., DEFENDANTS

ORDER

Defendants have filed a notice of appeal to the United States Supreme Court seeking review of the decision of the Three-Judge Court which heard this case. Now defendants have asked that I, acting as a single Judge, grant an extension of time to appeal the case to the United States Court of Appeals for the Tenth Circuit. I have submitted this request to the other two Judges on the Three-Judge Court, and all of us are in agreement that no such extension should be granted by me, acting as a single Judge, or by all of us, acting as a Three-Judge Court. We think that the case did involve a substantial constitutional question to be determined by a Three-Judge Court. That being so, no appeal lies to the Court of Appeals, and, speaking for all of the Judges on the Three-Judge Court, the request for an extension of time to appeal to the Court of Appeals is denied. The request is denied for the reason that we do not

think that the case is one subject to appeal to the Court of Appeals, and we do not wish to give tacit approval to an appeal which suggests the lack of a substantial constitutional question.

DATED at Denver, Colorado, this 12 day of September, 1978.

/s/ Fred M. Winner
FRED M. WINNER
Chief Judge
United States District Court

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